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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF ARIZONA**

9
10 BRIAN MONTGOMERY,

11 Plaintiff,

12 vs.

13
14 UNITED STATES CUSTOMS AND BORDER
15 PROTECTION,

16 Defendant.

Cause No.

17 **COMPLAINT**

18 5 U.S.C. § 552 *et seq.* Freedom of
Information Act; and § 701 *et seq.*,
Freedom of Administrative Procedure
Act

19 PLAINTIFF BRIAN MONTGOMERY ALLEGES:

20 1. Plaintiff, Brian Montgomery ("Montgomery" or "Plaintiff"), brings this action
21 under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, as amended, and the
22 Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, for declaratory and injunctive
23 relief against Defendant, the United States Customs and Border Protection ("Customs"), to
24 order the production of agency records which have been improperly withheld from Plaintiff.
25 The records sought consist of video footage and photographs of an accident captured by U.S.
26 Border Patrol cameras near the Naco, Arizona-Mexico border. These documents depict the

1 accident scene in which Mr. Montgomery was catastrophically injured, when the forklift he was
2 operating rolled over, severing one of his legs and crushing the other. These documents are
3 essential evidence in his civil action against the forklift manufacturer. He has no claim
4 whatsoever against the U.S. Customs Service, nor against any other agency of the United States
5 Government.

6 2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B),
7 28 U.S.C. § 1331, and 5 U.S.C. §§ 701-[706](#), and is empowered to grant the requested relief by
8 [28 U.S.C. § 2201](#). Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28
9 U.S.C. § 1391(e).

10 3. Plaintiff is an Arizona citizen.

11 4. Defendant Customs is an agency of the United States within the meaning of 5
12 U.S.C. § 552(f). Customs has possession and control of the records Plaintiff seeks.

13 BACKGROUND

14 5. On March 4, 2005, Brian Montgomery was working for Casto Electric of Sierra
15 Vista, Arizona. Castro Electric has a contract to install and maintain the lights on the
16 international border between Naco, Arizona and Mexico. While working on the lights, Mr.
17 Montgomery was injured when the forklift he was driving tipped over and fell on him. His
18 right leg was severed and his left leg crushed. He is now suing the manufacturer of the forklift.
19 James Kerley is an attorney from Sierra Vista, Arizona who represents Brian Montgomery with
20 Patrick Broom, an attorney from Tucson, Arizona.

21 6. The U.S. Border Patrol uses surveillance video cameras to monitor the border in
22 Naco, Arizona and caught footage relevant to the forklift accident. The U.S. Border Patrol also
23 took still shots of the forklift after the accident. These materials are of great interest to both
24 sides of the suit that Mr. Montgomery is bringing. Aside from trying to get the photographs
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1 and video that the U.S. Border Patrol took of the accident, Mr. Montgomery has no claim
2 against the U.S. Border Patrol or against the U.S. Government.

3 **FOIA REQUESTS**

4 7. On April 21, 2005, Mr. Kerley contacted Jim DeVito at the Assistant Chief
5 Counsel's office, Department of Homeland Security, U.S. Customs and Border Protection, in
6 Tucson, Arizona, who told Mr. Kerley that he would need to do a Freedom of Information Act
7 (FOIA) request to get the video relating to Mr. Montgomery's accident. Mr. DeVito also told
8 Mr. Kerley that he would preserve the videotape and not destroy it. Mr. Kerley's affidavit
9 attesting to his requests for the photographs and video from the U.S. Customs Service is
10 attached.

11 8. On May 23, 2005, Mr. Kerley, wrote to Janet K. Martin, an Assistant U.S.
12 Attorney in Tucson Arizona. Mr. Kerley explained that he represented Mr. Montgomery in a
13 claim against the forklift manufacturer and requested help in obtaining copy of a videotape
14 taken by a U.S. Border Patrol surveillance camera that had captured the accident on March 4,
15 2005. He further explained that he had no claim against the Border Patrol and that a FOIA
16 request would not help him in a timely manner.

17 9. On June 8, 2005, Mr. Kerley received a message from Cole Hernandez of the
18 U.S. Attorney's office in Tucson, Arizona. Mr. Hernandez said that he had spoken with Ms.
19 Martin, who said she had forwarded Mr. Kerley's request to Carol Blessy at the Assistant Chief
20 Counsel's office, Department of Homeland Security, U.S. Customs and Border Protection, in
21 Tucson, Arizona and that he should contact her, which he attempted to do.

22 10. On June 15, 2005, Mr. Kerley received a message from Elaine O'Hara of the
23 Assistant Chief Counsel's office, Department of Homeland Security, U.S. Customs and Border
24 Protection, in Tucson, Arizona, asking him to call her back.

1 11. Mr. Kerley wrote to the National Records Center, FOIA Division, in Lee's
2 Summit, Missouri on June 16, 2005 and explained that he represented Mr. Montgomery in a
3 personal injury action and officially requested the Naco videotape through FOIA.

4 12. On July 6, 2005, T. Diane Cejka, Director of U.S. Citizen and Immigration
5 Services (USCIS), U.S. Department of Homeland Security in Lee's Summit, MO, wrote to Mr.
6 Kerley. Ms. Cejka stated that her office had received Mr. Kerley's request for the video and
7 had searched for records that related to his request. She stated that if the records existed, they
8 would be maintained under jurisdiction of the office at the USCIS FOIA/PA Operations
9 Section, in Washington, D.C. She also stated that her office had forwarded Kerley's request
10 to USCIS FOIA Operations Section, and advised him to contact them with any further
11 inquiries.

12 13. On July 11, 2005, Ave M. Sloane, Chief of the USCIS FOI/PA Unit in
13 Washington, D.C., wrote to Mr. Kerley to inform him that the USCIS FOI/PA Unit had
14 received his request for the video, and that his request was being handled under FOIA. The
15 form letter identified a control number associated with his request, explained the fee
16 arrangements, and explained that in accordance with the multi-track system the FOI/PA Unit
17 used in prioritizing requests, his request was being put on the simple track.

18 14. Mr. Kerley wrote to Mr. Sloane on August 1, 2005 to correct his previous
19 statement of the date of the accident from March 1, 2005 to March 4, 2005. He explained the
20 circumstances of the accident and his representation of Mr. Montgomery and asked Mr. Sloane
21 to help expedite his request.

22 15. Mr. Sloane responded on September 16, 2005. He stated that the records that Mr.
23 Kerley requested, if they existed, were not under the purview of USCIS, but would be
24 maintained by the FOIA/PA officer at Immigration and Customs Enforcement (ICE) in
25 Washington, D.C., noting that he had forwarded Mr. Kerley's request to that office, that any
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1 further inquiries should be sent to that office, and that USCIS's action on the matter was
2 closed.

3 16. Gerald Crowley of Immigration contacted Mr. Kerley on November 22, 2005,
4 requesting more information on Mr. Kerley's request.

5 17. Elaine O'Hara at the Assistant Chief Counsel's office, Department of Homeland
6 Security, U.S. Customs and Border Protection, in Tucson, Arizona left a message for Mr.
7 Kerley on May 17, 2006 to apologize for not responding to Mr. Kerley's call; she had been out
8 of town. She asked him to return her call.

9 18. Mr. Kerley wrote to Elaine O'Hara at the Assistant Chief Counsel's office,
10 Department of Homeland Security, U.S. Customs and Border Protection, in Tucson, AZ on
11 June 2, 2006. He sent her a copy of all of the correspondence he had sent and received from
12 the National Records Center, FOIA Division, Ms. Cejka, and Mr. Sloane. He stressed the
13 importance of the videotape in Mr. Montgomery's case and asked to be informed if there were
14 other steps he needed to take to obtain a copy of the tape.

15 19. On June 20, 2006, Mr. Kerley's assistant spoke with Cynthia Atwood at USCIS
16 FOIA/PA Operations Section, in Washington, D.C. Ms. Atwood promised that she would send
17 a copy of the videotape, but when Mr. Kerley's assistant called on June 28, 2006 to follow up,
18 Ms. Atwood stated that she needed to speak with Mr. Kerley since he was the requestor. Ms.
19 Atwood set up a phone meeting with Mr. Kerley on June 29, 2006.

20 20. On August 14, 2006, Lisa Reed, a Public Relations Officer at the U.S. Border
21 Patrol office in Tucson, AZ, contacted Mr. Kerley to set up an appointment to view the
22 videotapes. Mr. Kerley contacted Patrick Broom, an attorney at Haralson, Miller, Pitt, Feldman
23 & McNally in Tucson, Arizona to let him know about the viewing.

24 21. On August 25, 2006, Ms. Reed allowed Mr. Broom to review the videotape, now
25 on DVD, and a set of photos taken at the Naco Border Station on March 4, 2005.

1 22. On August 31, 2006, Mr. Broom wrote to Ms. Reed to confirm that she would
2 preserve and not destroy the video and photos.

3 23. On September 5, 2006, Stephen Portell, an attorney at Quarles & Brady in
4 Tucson, Arizona, representing the forklift manufacturer, formally requested the USCIS FOI/PA
5 Unit in Washington, D.C. through FOIA to allow him to view and/or copy any videos or
6 photos relevant to the March 4, 2005 Naco incident. Mr. Portell also requested that any
7 relevant materials be preserved and not destroyed.

8 24. On September 20, 2006, Valerie McKeithan-Pannell, Chief of the USCIS FOI/PA
9 Unit in Washington, D.C. responded to Mr. Portell's request with a form letter, outlining the
10 fee arrangements and the multi-track system the FOI/PA Unit used in prioritizing requests,
11 placing Mr. Portell's request on the complex track.

12 25. Mr. Portell wrote to Cynthia Atwood at USCIS FOIA/PA Operations Section, in
13 Washington, D.C. on September 26, 2006. Mr. Portell thanked Ms. Atwood for allowing him
14 to review the video and photos held by Ms. Reed at the U.S. Border Patrol office in Tucson,
15 AZ. Mr. Portell stated that his letter would serve as a renewed FOIA request and specifically
16 identified each of the 7 DVDs and 1 photo CD he was requesting by disk number, camera
17 number, and time sequence. He stated that he wanted the disks for the purposes of his litigation
18 and not to reveal any evidence of border patrol activity, and requested copies of the items by
19 October 13, 2006. He also offered to bring his own equipment to assist in duplicating, if
20 needed.

21 26. Mr. Broom wrote to the USCIS FOIA/PA Operations Section, in Washington,
22 D.C. on December 27, 2006 to request formally, under FOIA, permission to view the videotape
23 and photographs at the Tucson Border Patrol office again, and to request copies of the
24 videotape and photos.

1 27. On January 17, 2007, Ms. Cejka, Director of U.S. Citizen and Immigration
2 Services (USCIS), U.S. Department of Homeland Security in Lee's Summit, MO, responded
3 to Mr. Broom's request in a form letter, outlining the fee arrangements and the multi-track
4 system the FOI/PA Unit used in prioritizing requests, placing Mr. Broom's request on the
5 complex track. She stated that if Mr. Broom could identify a specific document, exactly what
6 information was sought, or the location of the document, the FOI/PA Unit would consider Mr.
7 Broom's request for eligibility for the faster track.

8 28. Mr. Broom responded to Ms. Cejka's letter on January 24, 2007. Mr. Broom
9 requested reconsideration of his request for the faster track. He explained exactly what
10 materials he sought, exactly why they were needed, where they were located, the name of the
11 officer who possessed them, and that he had already reviewed the materials and was simply
12 requesting permission to obtain a copy of them.

13 29. Ms. Cejka replied to Mr. Broom's letter on February 12, 2007. She informed him
14 that his request was the 87,569th request on a list of 94,945 pending requests, and that she
15 would answer his request as quickly as possible.

16 30. On February 21, 2007, Mr. Broom, on behalf of Brian Montgomery, made an
17 official FOIA request to the U.S. Customs Service Port in Arizona, pursuant to 5 U.S.C. 552
18 and as outlined under 19 C.F.R. 103.0 et seq.

19 **VIOLATION OF FOIA REQUIREMENTS**

20 31. Almost two years have lapsed since Mr. Kerley first requested the video and
21 photographs from the U.S. Customs Service on behalf of Mr. Montgomery.

22 32. Over one month has passed since Mr. Broom made the latest official FOIA
23 request on behalf of Mr. Montgomery.

1 33. Customs has not complied with the statutory time limitations mandated by 5
2 U.S.C. § 552(a)(6)(A), which requires 20 days to respond to a FOIA request and 20 days to
3 "make a determination with respect to any appeal."

4 34. Customs also has not satisfied the requirements and procedures for an alternative
5 timeframe for processing the requests in accordance with 5 U.S.C. § 552(a)(6)(B).

6 35. Customs had not denied the existence of the records requested.

7 36. To the extent that Customs has denied any portion of Plaintiff's requests by
8 asserting an exemption under FOIA, Customs failed to satisfy any exemption with sufficient
9 particularity.

10 37. Plaintiff has exhausted his administrative remedies with Customs' failure to
11 comply with the applicable time limit provisions, see 5 U.S.C. § 552(a)(6)(C); 19 C.F.R.
12 §103.9(a).

13 38. Plaintiff has a statutory right to the records requested, he knows exactly where
14 they are located, he has been able to examine them, and there is no legal basis for Customs'
15 refusal to provide him with copies.

16 WHEREFORE, Plaintiff prays that this Court:

17 1. Declare that Customs, by withholding the requested records, is violating 5 U.S.C.
18 § 552(a)(3);

19 2. Order Customs to make the requested records available to Plaintiff forthwith;

20 3. Award Plaintiff costs and reasonable attorney fees in this action, pursuant to 5
21 U.S.C. § 552(a)(4)(E);

22 4. Declare that Customs' conduct as described in this Complaint is arbitrary,
23 capricious, an abuse of discretion, not in accordance with law, in excess of statutory authority
24 and limitations, short of statutory right, and without observance of procedure required by law
25 within the meaning of the APA, 5 U.S.C. § 706(2)(A), (C) and (D);
26

- 1 5. Provide for expeditious processing of this complaint; and
- 2 6. Grant such other and further relief as the Court may deem just and proper.

3 RESPECTFULLY SUBMITTED this 18 day of April, 2007.

4 HARALSON, MILLER, PITT, FELDMAN &
5 McANALLY, P.L.C.

6

7 By: /s/ Patrick E. Broom

8 Stanley G. Feldman

9 Patrick E. Broom

10 Rebecca A. Reed

11 Attorneys for Plaintiffs

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